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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

STEVE CHANG, et al.,

Plaintiffs and Appellants,

v.

AMERICAN CHILD DEVELOPMENT,
INC., et al.,

Defendants and Respondents.

B170234

(Los Angeles County
Super. Ct. No. KC039034)

APPEAL from a judgment of the Superior Court of Los Angeles County, Peter J. Meeka, Judge. Affirmed.

Monteleone & McCrory, Jeffrey Hurst, Andrew W. Hawthorne; Law Office of Kenny Tan and Kenneth K. Tan, for Plaintiffs and Appellants Steve Chang and Eric Truong.

Manning & Marder, Kass, Ellrod, Ramirez, Scott Wm. Davenport for Defendants and Respondents American Child Development, Inc. and World Discovery, Inc.

INTRODUCTION

Plaintiffs and appellants Steve Chang and Eric Truong (collectively Chang) sued defendants and respondents America Child Development, Inc. and Discovery World, Inc. (collectively American) for, among other things, specific performance and breach of contract. Chang moved in limine to have the specific performance cause of action tried before the breach of contract cause of action. The trial court denied the motion, and a jury rendered a verdict in Chang's favor on the breach of contract cause of action. The trial court then dismissed with prejudice the specific performance claim, stating Chang had elected their remedy by pursuing a trial on the breach of contract claim. Chang appeals the dismissal of the specific performance cause of action, but Chang failed to provide the reporter's transcript from the jury trial. Because the record therefore is inadequate to show error and prejudice, if any, resulting from the trial court's dismissal of the specific performance cause of action, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Chang sued American for breach of contract, specific performance, and declaratory relief based on an alleged agreement under which Chang was to buy real property and a child care business from American.¹ Before trial, Chang filed a motion in limine to try the equitable issues of specific performance and declaratory relief before the legal issues. American opposed the motion.

At the May 2, 2003 hearing on the motion, the trial court asked Chang's counsel if he had ever considered dismissing the breach of contract cause of action. Chang's counsel replied "no" and that "my client would like to have the election of remedies that is allowed under the law . . . So at this juncture, he's not willing -- . . . to dismiss [the]

¹ American cross-complained against Chang for declaratory relief, but the trial court dismissed the cross-complaint with prejudice after the jury trial.

breach of contract.” Thereafter, the trial court denied the motion and stated, “We will have a jury trial. We will see what happens. [¶] Any trial, any equitable trial for equitable issues remaining will be concurrent with any jury trial by the court. And it will be over next week one way or the other. Just please keep that in mind.”

The matter proceeded to a jury trial, and the jury rendered its verdict on May 9, 2003. The jury found there was a valid contract between Chang and American that American breached, and the jury awarded Chang \$57,513 in damages. Immediately after the jury was discharged, Chang requested a court trial on specific performance. American opposed the request and said an election of remedies had already occurred. The trial court said, “I agree. And that fork in the road presented itself to you, Mr. Tan [plaintiff’s trial counsel], Monday of this week. And, in fact, I even suggested to you why don’t you go ahead and dismiss your breach of contract cause of action and not have to deal with that issue in front of a jury. And you indicated otherwise. You elected to pursue your remedy in damages with a breach of contract here tried to a jury. It wouldn’t have mattered if it was tried to a court, but it was just an election, rather than just dealing with the equitable issues here. And, bottom line, you cannot have a double recovery here. And that would amount to a double recovery.”

After reviewing briefing from Chang on election of remedies, the trial court continued: “There definitely is an issue here dealing with election of remedies. I agree with Mr. Tan. The only disagreement I think we have is when did it take place or when should it take place. But at some point in time, plaintiff found himself at that fork in the road. And he needs to decide is he going to go to the left or is he going to go to the right. If he’s going to go to the left, then he is going to contend that he’s going to terminate the contract, he’s going to seek money damages, and he’s going to be filing his lawsuit and pursuing it in a breach of contract cause of action. He takes that right fork in the road and, basically, he’s stating he is affirming the contract and he’s going to seek a remedy pursuant to specific performance. [¶] Plaintiff undertook to elect to proceed on a breach of contract cause of action, seeking money damages . . . It would have been no different

if it was a court trial tried to me. Doesn't matter if it's a court trial or a jury trial. What really matters is the cause of action. This whole case was premised upon a breach of contract cause of action, the jury instructions, the argument, the damages. And the jury agreed with Mr. Tan, there was a contract between the parties, it was breached by the defendants, and the plaintiff suffered money damages. . . .”

The trial court concluded that the breach of contract cause of action was inconsistent with the specific performance cause of action, and that Chang elected a remedy when he proceeded with a trial on the breach of contract claim. The trial court therefore dismissed with prejudice the specific performance and declaratory relief causes of action. The trial court entered judgment, and this appeal followed.

DISCUSSION

Chang designated only the reporter's transcripts from the May 2, 2003 pretrial hearing on the motion in limine and the May 9, 2003 post trial proceedings. Chang did not designate the reporter's transcript from the jury trial. This court therefore ordered the parties to brief the issue of whether Chang's failure to designate the reporter's transcript of the jury trial warrants affirmance based on the inadequacy of the record. It does.

On appeal, the “plaintiff must affirmatively show error by an adequate record. [Citations.] Error is never presumed. It is incumbent on the plaintiff to make it affirmatively appear that error was committed by the trial court. [Citations.]” (*Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712; accord, *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295 [“It is the burden of the party challenging the fee award on appeal to provide an adequate record to assess error”]; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574 [“a party challenging a judgment has the burden of showing reversible error by an adequate record”].) If error is shown, a judgment will still not be reversed unless the complaining party has suffered prejudice. (Cal. Const., art. VI, § 13.)

The record here is inadequate to show prejudicial error. Chang moved in limine to have the specific performance cause of action tried before legal issues. The trial court

denied the motion. In doing so, it expressly advised the parties that “any equitable trial for equitable issues remaining will be *concurrent* with any jury trial by the court. And it will be over next week one way or the other.” (Italics added.) Thus, at least prior to trial, it was the trial court’s intent to try the legal and equitable issues together. Nothing in the record on appeal suggests the trial court made a contrary ruling that precluded Chang from introducing evidence regarding specific performance. In its opposition to Chang’s motion in limine, American stated, “Nor is there any reason why the Court cannot make a determination of whether specific performance lies in this case based upon the factual findings of the jury.” The trial court’s statements after the trial do not establish that it precluded evidence relevant to the issue of specific performance.

On this record, the trial court gave the parties the opportunity to present evidence regarding the specific performance cause of action during the jury trial. To prevail, Chang was required to prove all of the elements of a breach of contract plus adequate consideration and a just and reasonable contract. (See generally 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §§ 740, 741, pp. 198-199; Civil Code, § 3391, subds. 1 & 2.) Therefore, even assuming the trial court, after the jury verdict, incorrectly ruled that Chang had elected his remedy by proceeding to trial on his breach of contract cause of action, Chang cannot show prejudice. By virtue of his failure to designate the reporter’s transcript from the jury trial, we cannot ascertain whether Chang introduced evidence to show entitlement to specific performance or attempted to introduce such evidence and was precluded by the trial court from doing so.

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

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MOSK, J.

We concur:

TURNER, P.J.

GRIGNON, J.